FILED
SEP 12 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-114

UNITED STATES OF AMERICA,

PETITIONER,

- vs -

FELIX HUMBERTO BRIGNONI-PONCE,

RESPONDENT.

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

Pursuant to 18 U.S.C. § 3006A(d)(6) and Rule 53 of this Court, the Respondent, Felix Humberto Brignoni-Ponce, asks leave to proceed in forma pauperis without payment of fees and costs. The Respondent was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the District Court and on appeal to the Ninth Circuit Court of Appeals, and the Government seeks certiorari to review the unanimous judgment of the en banc Ninth Circuit.

Respectfully submitted,

DATED: 10 September 1974.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

During the early evening hours of 11 March 1973 Petitioner was driving a 1969 Chevrolet with two passengers north on Interstate 5 when he was stopped by Border Patrol Agents. The Agents had been parked at a ninety degree angle to the Interstate more than sixty miles from the Mexican border and had observed that the 1969 Chevrolet occupants were Mexican-appearing. The border patrol officers stopped the Chevrolet solely because it contained Mexican-appearing persons. [R.T. 18-19, 21-23] The stop established that the two passengers were aliens unlawfully in the country. [R.T. 24-25, 57-58] 1/

1/ "R.T." refers to the Reporter's Transcript.

The court of appeals, sitting en banc, unanimously rejected the contentions of the Government that the stop of Petitioner was permissible as an exercise of the statutory authority of border patrol agents "to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" under 8 U.S.C. § 1357(a)(1) and that the stop of Petitioner solely because the vehicle driven by him contained persons who appeared to be of Mexican descent was not inconsistent with or controlled by Almeida-Sanchez v. United States, 413 U.S. 216 (1973). In rejecting the contentions of the Government, the Ninth Circuit declined to follow United States v. Bowman, 487 F.2d 1229 (10th Cir. 1973), where the Tenth Circuit sustained the stop by border patrol agents at a New Mexico immigration checkpoint nearly one hundred miles from the Mexican border as authorized by § 1357(a)(1) and held that Almeida-Sanchez did not challenge "the right of immigration officials to make routine inquiries as to an individual's nationality." 487 F.2d at 1231.

The Tenth Circuit failed to consider the rationale not only of Almeida-Sanchez but also the prior decisions of this Court, none of which authorize the stop of an automobile on less than probable cause. After pointing out that Almeida-Sanchez concluded with the language of Mr. Chief Justice Taft in Carroll v. United States, 267 U.S. 132 (1925) and quoting that language, the court below said:

> "Had the Court intended to leave intact the government's asserted right to stop cars on mere suspicion anywhere in the country in order to interrogate their occupants, as to their right to remain in the United States, we doubt that it would have quoted this language from Carroll. Even more than immigration searches which had to be conducted within an area no more than 100 miles from the border, these immigration stops offend the 'right to free passage without interruption' of 'those lawfully within the country.'" (Pet.App.A at 5a)

Under the Tenth Circuit's interpretation of § 1357(a)(1) border patrol agents may stop vehicles upon mere suspicion anywhere within the United States. See, United States v.

Newman, 490 F.2d 993 (10th Cir. 1974), where the Tenth Circuit said of a border patrol agent stopped a vehicle on the Oklahoma Turnpike more than seven hundred miles from the Mexican border:

> "We do not question the right of a Border Patrol Agent to briefly detain an individual for the purpose of ascertaining his nationality. To this extent Agent Jackson's initial stopping of the appellants' vehicle in the case at bar was, in and of itself, not illegal." 490 F.2d at 995.

To accept the view of the Tenth Circuit is to grant border patrol agents the power to stop vehicles upon mere whim or caprice. It would permit them to apply and administer the law with an evil eye predicated upon skin pigmentation where, as here, they stopped the vehicle solely because its occupants were Mexican-appearing. Such arbitrary and unjustified basis for stopping individuals is as violative of equal protection and due process as the discrimination against race in the issuance of licenses in Yick Wo v. Hopkins, 118 U.S. 356 (1886); the study of law condemned in Gaines v. Canada, 305 U.S. 337 (1938); the discrimination against nationality in jury service rejected in Hernandez v. Texas, 347 U.S. 475 (1954); the discrimination against race in segregated schools overruled in Bolling v. Sharpe, 354 U.S. 497 (1954) and the miscegenation vitiated in Loving v. Virginia, 388 U.S. 1 (1967). To paraphrase Mr. Chief Justice Taft's oft-quoted words in Carroll v. United States, 267 U.S. 125 at 132 (1925):

> "... It would be intolerable and unreasonable if a (border patrol) agent were authorized to stop every automobile (whose occupants were Mexican-appearing) on the chance of finding (illegal aliens) and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a (stop) .... and (their) right to free passage without interruption....

Mexican-appearing fits the description of thousands of American citizens. United States v. Camacho, 468 F.2d 1382, 1383 (9th Cir. 1972), and it is impossible "to determine from looking at a person of Mexican descent whether he is an American citizen, a Mexican national with proper entry papers, or a Mexican alien without papers." United States v. Mallides, 473

F. 2d 859, 860 (9th Cir. 1973). This Court would not sustain a statute prohibiting persons of Mexican descent from securing licenses for operating motor vehicles. To permit immigration officers to restrict or interfere with the movement of vehicles solely because their occupants are Mexican-appearing would contravene the due process clause of the Fifth Amendment and deny such persons equal protection of the law. If § 1357(a)(1) authorized such stops, it would undoubtedly be held unconstitutional by this Court.

However, § 1357(a)(1) is not the source of such omnipotent power, and the Government apparently concedes this when it states:

> "Thus, while an officer need not, for the reasons we have discussed, have probable cause to believe that the automobile's occupants are aliens illegally present in this country-- i.e., that a crime is being committed -- he must reasonably believe that they are aliens." (Pet. at 14) (emphasis provided).

A reasonable belief that occupants of a vehicle are aliens necessarily requires "specific and articulable facts which, taken together with rational inferences from those facts" warrant such belief. Terry v. Ohio, 392 U.S. 1, 21 (1968). Such requirement is no more than the "founded suspicion" test applied by the court below.

Mexican-appearing per se falls short of facts upon which border patrol agents may "reasonably believe" that the Mexican-appearing individual is an alien. Were it otherwise, border patrol agents could "reasonably believe" that the entire citizenry comprising this nation are aliens upon the basis of Irish-appearing, German-appearing, Indian-appearing and dozens of other appearings.

Here, other than the Mexican-appearing,the only facts known to the border patrol agents were that the vehicle was more than sixty miles from the Mexican border proceeding north on Interstate 5. The court below properly held that such facts did not provide a "founded suspicion" for the border patrol

agents to stop the vehicle with its Mexican-appearing occupants. That decision was correct unless § 1357(a)(1) grants border patrol agents absolute authority to stop any and all vehicles anytime and anywhere without the "reasonable suspicion" found necessary for a street detention in Terry v. Ohio, supra.

CONCLUSION

For the foregoing reasons, the Respondent Felix Humberto Brignoni-Ponce respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

DATED: 10 September 1974.

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